

UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

IN RE: . Case No. 01-1139 (JKF)
. .
W.R. GRACE & CO., .
et al., . USX Tower - 54th Floor
. 600 Grant Street
. Pittsburgh, PA 15219
Debtors. .
. February 16, 2010
. 10:39 a.m.
.

TRANSCRIPT OF TELEPHONIC HEARING
BEFORE HONORABLE JUDITH K. FITZGERALD
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: This is the matter of W.R. Grace,
2 Bankruptcy Number 01-11-39. Everyone is appearing by phone. I
3 have a video link to the courtroom in Delaware, but I don't see
4 anyone there, and I'll shut the video link down if, in fact,
5 there is no one present. Is there anybody in court in
6 Delaware?

7 SHERRY: No, just me.

8 THE COURT: Okay. Thank you, Sherry. We'll just
9 shut the video link down then since everyone's appearing by
10 phone.

11 SHERRY: Okay.

12 THE COURT: All right. Thank you.

13 SHERRY: You're welcome.

14 THE COURT: List of participants I have by phone.
15 Scott Baena, Janet Baer, Ari Berman, David Bernick, John Bird,
16 David Blabey, Jeffrey Boerger, Deanna Boll, Thomas Brandi, Peg
17 Brickley, Michael Brown, Oliver Butt, Elizabeth Cabraser,
18 Kellie Cairns, Stefano Calogero, Christopher Candon, Linda
19 Casey, Gabriella Cellarosi, Richard Cobb, Tiffany Cobb, George
20 Coles, Leslie Davis, Michael Davis, Elizabeth DeCristofaro.
21 John Demmy, Martin Dies, John Donley, Melanie Dritz, Terence
22 Edwards, Marion Fairey, Jeffrey Farkas, Debra Felder, Richard
23 Finke, Jordan Fisher, Roger Frankel, Theodore Freedman, Michael
24 Giannotto, Daniel Glosband, Christopher Greco, James Green,
25 John Greene, Robert Guttmann, Sarah Harnett, Daniel Hogan,

1 Robert Horkovich, Mark Hurford, Brian Kasprzak, David Klauder,
2 Stuart Kovensky, Matthew Kramer, Arlene Krieger, Lewis Kruger,
3 Michael Lastowski, Richard Levy, Michael Linn, Peter Lockwood,
4 Edward Longosz, Alan Madian, Kevin Mangan, Garvan McDaniel,
5 James O'Neill, Kenneth Pasquale, Carl Pernicone, Margaret
6 Phillips, Robert Phillips, John Phillips, Mark Plevin, Warren
7 Pratt, Francine Rabinovitz, Joseph Radecki, Alan Rich, Andrew
8 Rosenberg, Ilan Rosenberg, David Rosendorf, Samuel Rubin, Alan
9 Runyan, Jay Sakalo, Alexander Sanders, Darrell Scott, Mark
10 Shelnitz, Michael Shiner, Robert Siegel, Walter Slocombe,
11 Daniel Speights, Shayne Spencer, Theodore Tacconelli, Stephen
12 Tetro, David Turetsky, Edward Westbrook, Jeffrey Wisler,
13 Richard Worf, Richard Wyron, Elizabeth Yu, and Rebecca Zubaty.

14 Ms. Baer.

15 MS. BAER: Good morning, Your Honor, Janet Baer on
16 behalf of W.R. Grace.

17 Your Honor, on the agenda today the first item is the
18 25th omnibus objection. Those matters are being continued to
19 March 22nd while we continue to work through them. One note,
20 Your Honor, the Munoz's matter is listed as being continued to
21 April 12th. Actually it's April 19th. Your Honor, changed the
22 hearing in April.

23 THE COURT: Okay.

24 MS. BAER: Agenda Item Number 2, Your Honor, is the
25 debtor's objection to the claim of Maryland Casualty Company.

1 That matter is being continued until March 22nd. We do
2 anticipate taking it up at the March 22nd hearing.

3 THE COURT: Go ahead.

4 MS. BAER: Your Honor, agenda Item 3 and 4 are the
5 two applications of Canadian counsel to be appointed special
6 counsel in the U.S. Your Honor, the parties have agreed that
7 those matters should be put over to the March 22nd hearing.
8 The appeal of the order in Canada approving the amended
9 Canadian ZAI settlement is set to be heard on February 19th and
10 the parties want to have these matters heard after that appeal
11 has been heard in Canada.

12 THE COURT: All right.

13 MS. BAER: Your Honor, this morning you entered
14 orders on Numbers 5 and 6, Number 5 being the neutrality
15 stipulation and Number 6 being the application to amend the ART
16 credit agreement. That takes us, Your Honor, to item Number 7
17 on the agenda.

18 THE COURT: Wait. Ms. Baer, before you go there, I
19 did enter the order this morning that approves the stipulation
20 with respect to Item 5. But, I'm a little bit concerned about
21 this language so I want the parties to understand I'm approving
22 this change to the plan language, but I'm not necessarily
23 agreeing that this constitutes either an appropriate order that
24 the Court will enter or an agreement that this language is
25 either insurance neutral -- it's not really a neutrality issue.

1 I'm concerned about one finding that this provision is asking
2 that I make, and I'm not sure that I can make that finding. So
3 I just want the parties to understand I'm agreeing to this plan
4 change because it's your plan, but I'm not agreeing that I'm
5 going to sign an order that approves this language. Go ahead.

6 MR. BERNICK: Well -- Your Honor, this is David
7 Bernick. Which finding is it that has Your Honor concerned?

8 THE COURT: That the procedures that have been
9 established by the plan for the evaluation and paying of
10 asbestos claims and demands are reasonable or appropriate. I
11 think that's the only one off-hand. But, it seems to me I
12 can't confirm this plan without making that finding. And I
13 don't see how, after I make it, any other court is going to be
14 able to make a different finding. So, I've got a problem with
15 that one. It's on agenda item Number 5, Mr. Bernick, in
16 Exhibit A on the second page. It's numbered Page 2. It's
17 Romanette ii.

18 MR. BERNICK: Is Peter Lockwood on the phone?

19 MR. LOCKWOOD: Yes, I am. I'm sorry, I'm trying to
20 locate where we are. It's on --

21 THE COURT: It's in Agenda Number 5 in Exhibit A,
22 which is the insurance neutrality language, 7.15. It's on Page
23 2 of that document, and it's under the heading -- well, it's a
24 pretty long sentence.

25 MR. LOCKWOOD: Oh, I see it. The procedures by the

1 plan -- let me just see.

2 THE COURT: For evaluating and paying the claims are
3 reasonable or appropriate. I don't know how I confirm the plan
4 unless I can make that finding. And if I do, I don't see how
5 it's not going to be binding on other courts. This provision
6 is saying that no one can use as evidence or argue in any forum
7 to prove or claim that those procedures were reasonable and
8 appropriate, and I'm not exactly sure what that means. For
9 example, does that mean that there's no appeal based on that
10 finding?

11 MR. LOCKWOOD: No, I think the understanding, and I
12 believe this language may be identical to a provision that you
13 approved in the Federal Mogul plan, Your Honor. But, in any
14 event the plan as we see it, or let's say the ACC sees it, is
15 under applicable law is essentially contract between the debtor
16 and its creditors and other interested parties which is
17 approved by the Court. This provision is, in effect, an
18 agreement on the part of the plan proponents which is -- or to
19 be that as to what they will or will not use as evidence or
20 argument in a coverage case. As such it doesn't purport to
21 bind the coverage court, I don't believe.

22 What I believe it binds is the trust or the
23 reorganized debtor, whichever one would be the litigating party
24 in a coverage case. It would bind them as to what they might
25 or might not seek to do in that litigation. And so for example

1 as I understand it, and others can disagree if they think I've
2 got it wrong, what we've agreed here is, let's take the trust
3 because this stipulation essentially addresses the standing of
4 non-settling -- not the standing -- it addresses the rights of
5 non-settling insurers whose policy coverage has been assigned
6 to the trust.

7 So, normally the trust would be the party in coverage
8 litigation asserting whether or not certain claims that were
9 presented to and resolved by the trust should or should not be
10 indemnified by insurers to whom -- whose insurance rights have
11 been assigned to the trust, but who have not entered into a
12 settlement agreement with the trust about it. And what this
13 would say is, if the trust and its lawyers were involved in
14 such litigation with the effected insurers that if they
15 attempted to use the plan, or the plan documents or the various
16 confirmation orders to introduce them or to present them to the
17 coverage judge to support an argument that the plan procedures
18 -- well, actually I misspoke when I said the plan. You have to
19 go back and look at it. It says --

20 THE COURT: Mr. Lockwood, I'm sorry, but you've lost
21 me. What I think this procedure -- what this is attempting to
22 say is that no party can use the findings that I have to make
23 that determine that these procedures are appropriate because I
24 can't confirm the plan, I think, unless I determine that they
25 are appropriate, that no party can use those in the coverage

1 court to prove that the procedures are appropriate.

2 MR. LOCKWOOD: That's correct.

3 THE COURT: Is that what you're saying?

4 MR. LOCKWOOD: That's correct.

5 THE COURT: Okay.

6 MR. LOCKWOOD: All we're doing is, we're agreeing
7 that in the -- the various materials in Subparagraph (b) under
8 the heading of Roman I, Roman II, Roman III and Roman IV, none
9 of those materials will be introduced on behalf of the trust,
10 for example, to argue --

11 THE COURT: With respect to any particular claim.

12 MR. LOCKWOOD: -- what?

13 THE COURT: With respect to any particular claim.

14 MR. LOCKWOOD: Correct.

15 THE COURT: All right. That's fine.

16 MR. LOCKWOOD: In other words, --

17 THE COURT: Okay, that's fine.

18 MR. LOCKWOOD: Okay.

19 THE COURT: All right.

20 MR. LOCKWOOD: I think I got that right. If anybody
21 else disagrees feel free to correct me. But, I think that's
22 the way we all understand it.

23 THE COURT: All right. Anybody have a different
24 view?

25 THE COURT: All right. No one's asking to be heard.

1 Go ahead, Ms. Baer, Number 7.

2 MS. BAER: Thank you, Your Honor. Number 7, Your
3 Honor, is the debtor's motion to establish a protocol for
4 dealing with employee claims.

5 THE COURT: Yes. I understood that a different type
6 of order or something was going to be submitted, but I haven't
7 seen one.

8 MS. BAER: Your Honor, we submitted on a
9 certification of counsel the same order with a slightly revised
10 notice that added a few changes that were requested by the
11 unsecured creditor's committee, and a blackline of that notice
12 was attached to the certification of counsel that was filed
13 with this.

14 THE COURT: When?

15 MS. BAER: The certification of counsel was filed on
16 the 9th of February at Docket 24269.

17 THE COURT: Well, that's the one I had that I thought
18 the agenda said was going to be revised again.

19 MS. BAER: The agenda two times ago said it was going
20 to be revised. That was in error. The agenda we filed
21 yesterday and this morning indicates that the new form of order
22 was submitted and that is the correct document. It has not
23 changed again.

24 THE COURT: All right. Just a minute. I don't know
25 if I have that here. No, I don't have that here. That form of

1 order -- oh, wait, I'm sorry, 24269. I think I do have it
2 here. Okay, so the form of order that's in the binder attached
3 as Exhibit A that says, "The revised form of benefit
4 continuation notice is Exhibit 1 to the form of order," that's
5 the correct order to enter?

6 MS. BAER: Yes, that's the correct order.

7 THE COURT: All right. I'll have that order entered.

8 MS. BAER: Thank you, Your Honor.

9 THE COURT: Just one second, let me make a note.

10 Okay, Ms. Baer.

11 MS. BAER: Your Honor, agenda item Number 8 is the
12 debtor's application for entry -- of approval to enter into
13 certain engagement letters with respect to exit financing, and
14 you entered that order this morning.

15 THE COURT: Go ahead.

16 MS. BAER: That takes us to agenda item Number 9,
17 Your Honor. Agenda item Number 9 is the debtor's request to
18 enter into a new letter of credit and hedging agreement which
19 replaces its current DIP facility. Your Honor, we filed a
20 certification of counsel I believe the day before yesterday on
21 this one. We had needed to make a number of changes requested
22 by the unsecured creditor's committee. There was one further
23 change that had not been made and we corrected that last night
24 to make it clear that that change had not been made. And the
25 form of order that we did submit on a certification of counsel

1 is the correct one.

2 Your Honor, this is a nice situation, I must say,
3 where we are replacing our DIP because we don't need it.
4 Instead, we will simply have the letter of credit facility
5 which is \$100 million credit facility. It is cash
6 collateralized and the only security interest the lenders have
7 is in the cash collateralized account. The other assets of the
8 debtors are not secured by the lender's liens. In addition,
9 the hedging arrangement which was part of the DIP and is now
10 part of this new agreement is secured by two cash collateral
11 accounts.

12 The hedging is for currency risks, as well as
13 commodity risks. And, Your Honor, the changes that were made
14 to the order reflected, in large part, making it very, very
15 clear that the super priority claim that the lenders have is
16 solely to the extent of the cash collateral account. And that
17 correction was made in a number of places in the order. In the
18 facility's agreement itself there were two changes. A change
19 to Section 9.1K and a change to Section 13.7. The change to
20 Section 9.1K added the term "material" with respect to
21 competing super priority claims and liens. And in 13.7 it
22 added the words "reasonably documented" to modify the
23 attorneys' costs that are compensable. And, Your Honor, we
24 would ask that you enter the amended order with the amended
25 facility's agreement.

1 THE COURT: Okay. I never got an original order.
2 There was nothing in the binder with respect to this. So, I
3 don't really know whether I have an amended order because the
4 only thing I've seen is what came in today and I'm still
5 reading through all of this because I didn't have it in the
6 binder. What I have is marked in the bottom left corner
7 91100-001/doc_de:157467.1. Is that the correct order? It's 19
8 pages long.

9 MS. BAER: That does -- is not the -- I only have the
10 blackline in front of me, not the clean one. I do know that it
11 was filed with certification of counsel, 24295 filed on the
12 15th of February.

13 THE COURT: Okay. I don't know what the docket
14 numbers are because when they print it out there was no -- and
15 the cover letter doesn't have that COC number in it. What I
16 have is a cover letter that's dated February 12th establishing
17 Docket Number 24281 as the COC. And it relates to Docket
18 Number 24156 as the motion. I'm not sure I have the same thing
19 you're looking at.

20 MS. BAER: Right.

21 THE COURT: That's what you printed today.

22 MS. BAER: Your Honor, one way to tell is on the
23 final order, on the very second line if the date January 15th
24 is filled in then you have the right order. That was blank in
25 the original submitted order.

1 THE COURT: Okay. It is filled in. It's not
2 underlined. It's just dated January 15?

3 MS. BAER: Right.

4 THE COURT: Okay.

5 MS. BAER: Then that is the correct clean order.

6 THE COURT: All right. Okay. I'm just about
7 finished reading through all this. I don't see any issues with
8 it so I expect that it will be entered later today. But, I'm
9 going to finish reading before I can say that.

10 MS. BAER: Of course, Your Honor. Thank you. If
11 there's anything we need to do just let us know.

12 THE COURT: All right. Thank you.

13 MS. BAER: Your Honor, that takes us to the last item
14 on the agenda which is agenda item Number 10. Essentially, a
15 status on where we are with respect to various plan objections.
16 And Mr. Bernick will address the Court on that.

17 THE COURT: Mr. Bernick?

18 MR. BERNICK: Your Honor, we've endeavored -- I think
19 you can see from some of the stipulations that are now before
20 you, we've endeavored to try to reduce the number of issues
21 that are outstanding for resolution. I know it always comes
22 late in the day after Your Honor already has done significant
23 work. And we can't claim that we are clean on that one -- in
24 that respect this time, but we are making that effort, and you
25 can see the results. We have the 502(e) stipulation which was

1 10(a). We have insurance neutrality which was Item 5. We have
2 the Kaneb stipulation which is also part of Item 10.

3 And then we spent a lot of time, and I say we, in a
4 generous sense of we, all the interested parties spent a great
5 deal of time trying to reach closure on a global basis with
6 respect to all objections that have been made by One Beacon and
7 Seaton. And we've been successful in that and we appreciate
8 the efforts of Mr. Brown and Mr. Pratt in that regard, as well
9 as their clients. And that stipulation covers all of the
10 objections and, of course, that will include the successor
11 claims injunction objection that Your Honor has spent a good
12 deal of time focusing on. So, we're -- we think we're making
13 very good progress in that regard.

14 There are some more items that are still progressing,
15 and really the purpose of my speaking to this issue this
16 afternoon, or this morning, is to indicate, you know, what
17 we're working on and things that we really don't think,
18 ultimately, are going to be resolved and are going to require
19 Your Honor's attention in connection with the confirmation
20 order.

21 As we reported the last time with respect to Morgan
22 Stanley we do have an agreement in principle with them. We're
23 still drafting that, but that's on track. There are continuing
24 discussions with CNA regarding their successor claims
25 injunction insofar as it would have impact on them. And those

1 discussions are ongoing and we're hopeful that that also will
2 be resolved, but we don't have it done as we sit here today.

3 There have been significant discussions with National
4 Union and Longacre concerning their -- the objections that they
5 have with respect to their claims. And Your Honor will recall
6 that we had an extensive argument about the classification of
7 those claims. We're trying to resolve those objections.
8 Progress has been made, but we're still not there and we hope
9 to have further report to the Court if and when we know whether
10 that's going to be resolved. But, there are active discussions
11 there.

12 With respect to Canada, as Ms. Baer reported the
13 special counsel matters have been put over to March 22. In the
14 meantime we're also trying to -- attempt to resolve some of the
15 issues between representative counsel and the crown with
16 respect to the underlying settlement, and we hope that we can
17 resolve that, as well, but it's not done as we sit here today.
18 So, we hope that comes to closure by the time of the next
19 omnibus.

20 So, those are all of the areas where we either have
21 come to closure or we're cautiously optimistic that closure
22 will be attained. We are not as optimistic, and it's without
23 criticism, of course, with respect to two major matters. One
24 is the objection of the bank lenders. It turns out that the
25 market now for those securities is trading at a price that

1 would reflect the plan's rate of interest, and that would
2 otherwise make us optimistic that a resolution could be
3 reached. But, there have been contacts and they really have
4 not gone anywhere.

5 So, I think that Your Honor's going to have to
6 resolve that issue, which is probably not news to Your Honor,
7 but it is where things are, and that is after, you know, frank
8 communications to assure that there isn't some way out of this
9 issue. And I just don't think -- the debtor does not believe
10 that there is, and I think that counsel for the lenders has
11 been candid in their assessment, as well. So, I think Your
12 Honor is going to have to resolve that.

13 The Libby situation which has obviously required a
14 lot of work and a lot of attention is still not there. There
15 was a report made to the Court, I think it was last fall, from
16 Mr. Heberling that he was cautiously optimistic that the matter
17 could be resolved. There have been extensive discussions
18 between the Libby claimants and their counsel and the ACC and
19 the FCR since that time to try to reach resolution with the
20 Libby claimants. I think I indicated to Your Honor that some
21 of the issues don't really relate to the debtor, at all, they
22 relate to third parties such as the insurance company. But,
23 we've not heard that there is resolution.

24 And so I reached out last week to Mr. Cohn and Mr.
25 Heberling basically indicating that, you know, the time was

1 growing short and we didn't see that we were yet there. And I
2 know that Mr. Cohn and Mr. Heberling were to go back to their
3 team and see if the matter was amenable to resolution, but I
4 haven't heard anything back. And I think after all these many
5 months if we're not there we're not there.

6 So we, of course, will remain interested in whatever
7 the Libby claimants want to continue to pursue by way of
8 discussions. But, we no longer are as optimistic as we once
9 were that the Libby issues will be resolved. And to that
10 extent as I indicated at the hearing before at a certain point
11 we're just going to have to ride with whatever Your Honor's
12 going to determine. So, that is pretty much the list.

13 There are obviously other people who have objections
14 and issues that have been raised. If they haven't been listed
15 on this call there aren't really -- there isn't really to our
16 assessment some near term prospect of resolution, and so
17 they're not on the list. But, that is again, not for want of
18 having tried throughout the long process of this case and
19 continuing up through more contemporary time.

20 THE COURT: All right. Mr. Bernick, I think I'm
21 going to need something from somebody that tells me
22 specifically what issues really are still on the list to be
23 adjudicated, and what the plan in final form is going to look
24 like. Because there have been so many modifications, honestly
25 at this point I don't know what I'm being asked to confirm. I

1 need a document that explains this from, I think, start to
2 finish. My clerk is working on an issue that was left over
3 from Federal Mogul. I hope to have that done by the end of
4 this month. And then I'm starting on these plan issues.

5 So, if I need to start with the bank lenders and
6 Libby that's what I'll do. If I need to knock them down one at
7 a time, that's how I'll go about doing it. But, I still need
8 to know what the plan treatment is as to each creditor and what
9 the plan language is in a unified document.

10 MR. BERNICK: Yeah, I think that that's -- I am happy
11 that Your Honor has shared with us your sequence there. I
12 think that those would be two good issues to begin with, and
13 first among them probably the lenders. And with respect to the
14 other issues beyond Libby and the lenders we will, in fact,
15 furnish to the Court a list of what's still out there and, you
16 know, in terms of the plan in its current form so that Your
17 Honor will have a clear road map for what it is that's left
18 beyond Libby and the lenders. And we will be sure to be timely
19 given Your Honor's schedule. Obviously, the plan proponents
20 are very anxious to proceed here and so we want to -- we don't
21 want to be an obstacle if Your Honor's going to devote all the
22 work that's going to be necessary to get this done.

23 THE COURT: Okay. With respect to the stipulations
24 that are filed at Item 10, am I being asked to do anything that
25 approves these? I have stipulations, but that's all. I don't

1 have orders that attempt to approve them. So, is this just
2 something that's going -- the plan language is going to change
3 and then you're going to give me this new revised plan in final
4 form?

5 MR. BERNICK: I would defer to Ted and to Peter on
6 that -- and Jan -- but I believe that that's the plan.

7 MR. FREEDMAN: Your Honor, we are not asking the
8 Court to do anything on the stipulations that we have
9 presented. Jan, if I'm wrong on any of those, please let us
10 know. But, I believe that that is correct, certainly, on the
11 recently filed one with respect to One Beacon Seaton and the
12 one that relates to Section 502(e). With respect -- and we
13 will be filing a revised amended plan through the date that
14 it's filed which will set forth all of the current language in
15 the plan that reflects all of these agreements, as well as an
16 amended chart setting forth the status of objections to the
17 plan so the Court has a clear picture of what objections are
18 still pending.

19 THE COURT: Okay. If you're still working toward
20 getting some of these things resolved, I'd just suggest that
21 you don't do it until you're actually sure that this is the
22 document I'm being asked to confirm. Because once that happens
23 and I actually start down that road, at that point I'm not too
24 inclined to have changes coming in until I figure out whether
25 the plan that I have before me is confirmed. So, if you want

1 -- I don't know, maybe until the next omnibus or something to
2 see what else can be resolved?

3 MR. BERNICK: Well, I think that we're pursuing all
4 the different things that we've reported on to the Court and
5 we're pursuing them exactly with the anticipation that it
6 would, you know, with the kind of schedule in mind that Your
7 Honor has indicated that is, that at a certain point you reach
8 the end of the day. And we've really been driven, in part, by
9 the omnibus hearings because we know we make reports to the
10 Court and Your Honor then gets to know where we are.

11 I think that we are probably going to want to be
12 working on a somewhat tighter time table to find out which
13 issues can and cannot be resolved so that you actually get the
14 schedule of remaining issues really as soon as we can. That's
15 not to say we're cutting anything short. It's just a question
16 of things being what they are, people always work better if
17 they're facing a deadline. So, we will work to come to
18 conclusion on the discussions that are outstanding, get you the
19 list of issues, and my expectation is certainly it'll be before
20 the next omnibus.

21 THE COURT: Okay. Anything else? Anyone have any
22 issues to raise? Okay, we're adjourned. Thank you.

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C E R T I F I C A T I O N

I, KIMBERLY UPSHUR, court approved transcriber,
certify that the foregoing is a correct transcript from the
official electronic sound recording of the proceedings in the
above-entitled matter, and to the best of my ability.

/s/ Kimberly Upshur

KIMBERLY UPSHUR

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